

**BEFORE LINDA MCCULLOCH
SUPERINTENDENT OF PUBLIC INSTRUCTION
STATE OF MONTANA**

IN THE MATTER OF [THE STUDENT])

)

OSPI 2004-09

)

FINDINGS OF FACT, CONCLUSIONS OF LAW, MEMORANDUM AND ORDER

Introduction

[Parent] and [parent], the parents of [the student], filed a request for Due Process with the Montana Superintendent of Public Instruction on July 23, 2004. [The student] was a student at [the district] from September until December 15, 2003. He was removed from [the district] by his parents and placed in MontCalm School, a residential educational facility located in Albion, Michigan.

His parents enrolled him at MontCalm without the referral or consent of [the district]. He began to attend MontCalm on January 14, 2004. As of the date of the hearing [the student] continued to attend school at MontCalm. His parents seek reimbursement from [the district] for the cost of enrolling [the student] in MontCalm School.

The parties attempted to settle their dispute and the parents waived the requirement of 34 CFR 300.511 that an Order be issued within 90 days of a request for a due process hearing. Following a prehearing conference on January 11, 2005, a hearing was held in Great Falls, Montana on January 18, 2005, and continued on February 4, 2005. The parents were represented by Anna Hughes. [The district] was represented by Roger Witt.

The parties agreed statement of the issues to be heard is as follows:

1. Whether or not [the district] failed to write an Individualized Educational Program that adequately addresses the special needs of [the student];
 2. Whether or not the [district] provided a free appropriate education to [the student];
 3. If not, whether [the student] requires placement in a residential setting in order to receive an educational benefit;
 4. If so, to what extent the [district] should be required to pay the costs of placement within a residential setting;
 5. Whether or not the [district] provided [the student] and the family of [the student] with appropriate support services pursuant to the Individuals with Disabilities
- (Parties proposed pre-hearing Order)

Numerous witnesses appeared, in person or by telephone, and were sworn and testified. The testimony is recorded by a court reporter. The following exhibits were admitted into the record:

School District Exhibit A page 100001-643:special education file.
School District Exhibit B page 100644-888: cumulative education file.
School District Exhibit A-1 page 100890: notice of procedural safeguards under IDEA.
School District Exhibit B page 100889:communication goal progress summary for [the student] (Inadvertently omitted from pre filed exhibit.)
School District Exhibit C: MontCalm School/Starr Commonwealth IEP Prescription -initial.
School District Exhibit D: [the student's] progress on IEP Goals.
Parent Exhibit 1:1/19/03 letter to [the district].
Parent Exhibit 2: IEP from 2000. (Exhibit A page 100158-177.)
Parent Exhibit 3: 3/17/2003 Behavior Assessment System for Children (BASC) (Exhibit A page 100174-200.)
Parent Exhibit 5: Student Withdrawal Slip (Exhibit A page 100726.)
Parent Exhibit 6: IEP from 2001 with update notes dated 5/21/01 (Exhibit A page100189-223 except page 100222 is omitted)
Parent Exhibit 7: [the district's] Psycho-educational Evaluation Report (Exhibit A page 100286 -301.)
Parent Exhibit 8: IEP dated 3-26-03 with 9-8, 9-29 and 10-27, 2003, notes, parents' letter dated May 10, 2003 (Exhibit A page 100310-349.)
Parent Exhibit 8-b: "Mainstream Notes" (Exhibit A page 350-351.)
Parent Exhibit 8-c: Paraprofessional notes (Exhibit A page 353--354.)
Parent Exhibit 9: IEP dated 3-26-03 without 9-8-03 notes and some page of Child Study Team Report.
Parent Exhibit 10: Phone log [the district] ED classroom 2003-2004 (Exhibit A page 100387-388.)
Parent Exhibit 11-A: OT Evaluation. (Exhibit A page 100027-030)
Parent Exhibit 11-B: Pediatric Therapy Evaluation. Exhibit A page 100031-039.)
Parent Exhibit 12: Letter from Educational Connections, LLC, to Anna Hughes.
Parent Exhibit 13: Report from Sage Walk.
Parent Exhibit 16: Memo to Roger Witt from [the district]

Parent Exhibit 17: Notes of [the district's] counselor.

Based upon the evidence in the record, are the following:

FINDINGS OF FACT

The parties reached agreement on six facts, which are incorporated into this order as Findings of Fact 1-6. The bracketed material has been added for clarity (also to redact personal information).

1. [The student] was a student at [the district] High School [“[the school], a high school in the District] from September 2003 to December 2003.
2. [The student] attended the Woodhall School [A residential educational facility in Connecticut] from April 2003 to June 2003.
3. [The student] attended SageWalk, a wilderness program for troubled youth on July 16, 2003 to August 2003.
4. [The student] attended [the district] High School from September 2003 to December 15, 2003. [Same fact as FOF 1.]
5. [The student] attended SageWalk from December 16, 2003 to January 14, 2004. [[The student] returned to the same program described in FOF 3]
6. [The student] was enrolled at MontCalm on January 15, 2004 and currently is in attendance there. MontCalm is a residential educational facility located in Albion, Michigan.
7. [The student]’s parents reside in the District (Testimony of [parent])
8. [The student] was born August 12, 1987. For purposes of the Individuals with Disabilities Education Act (IDEA), §§ 20 U.S.C. 1400, (2004) et seq. the Child Study Team (“CST”see FOF 17-19 below) identified him as autistic, other health impaired, specific learning disabled, and speech and language impaired. (Exhibit A page 100306.) His disabling conditions are not in dispute.
9. Autism is a spectrum disorder. [The student] falls within the higher functioning part of the spectrum with a diagnosis of Asperger’s Syndrome. (Parent Exhibit 1.)
10. [The student] has attended many schools. (Testimony of [parent] and Exhibits A and B.) From kindergarten through 5th grade he attended private schools in the *** area. In 1996 he attended [the district] and began receiving special education services. In 7th and 8th grade he was home schooled part of the day and attended a private school part of the day. He received speech therapy from [the district] while attending private school. (Exhibit A page 1-256.)

11. [The student] attended a private Catholic High School in [the town] his freshman year. He was receiving passing grades in all of his general education courses. The last half of 9th grade his parents placed him as a boarder at a local private school. (Exhibit A page 100261.)
12. In February of 2003 [the student]'s parents contacted [the district] about [the student] attending [the district]. With the parents consent (Exhibit A page 100259) [the district] arranged for an evaluation of [the student]. A student being considered for special education is entitled to a full and individual evaluation to determine the child is a "child with disabilities" and determine the educational needs of the child. 34 CFR 300.320 and 10.16.3321 ARM.)

Evaluation.

13. [The student] received a full and individual evaluation. (Exhibit A page 260-306.)
14. His evaluation included aspects of sensory perception and sensory integration. Sensory integration is the neurological process by which external sensations are organized for use. [The student] has sensory integrative dysfunction. This results in difficulty with visual perception tasks and over-sensitivity to sensory input. [The student] has difficulty with transitions between activities, places and people. (Testimony of Occupational Therapist and Speech Therapist, Exhibit 11; Exhibit A page 000035-36.)
15. [The student] tested high for cognitive skills (Exhibit A page 100291.) His IEP also noted that he is "uniquely gifted." Prior to attending [the district] he successfully completed the first year of high school. He also completed college level math classes over the Internet. [The district] requires 23 credits to graduate. It granted him several credits toward graduation. (Exhibits A 100339 and Testimony of ****.)
16. [The student] has unpredictable emotional outbursts, delayed or no response to social communication, hypersensitivity to sound and short attention span, which are all typical behaviors of persons with Asperger's Syndrome. [The student] has difficulty in the areas of paying attention, complying with direction, and work completion. (Psychoeducational Evaluation Report Exhibit. 7, p. 38)

Child Study Team.

17. Child Study Teams (CST) are used to identify children with disabilities and plan an individual education program (IEP.) A CST was convened by [the district]. The CST consisted of [the student], his parents, [the district]'s special education coordinator and administrator, a regular education teacher and gifted education program assistant, a special education teacher, a school psychologist, a speech pathologist and an occupational therapist. (Testimony of **** and Exhibit A page 100262-308.)
18. The CST assessed [the student] and concluded that he would benefit from special education services. An IEP was developed on March 26, 2003. [The student]'s IEP provided for education in general education classrooms for band, calculus and physics, English in a resource room and history and "exceptionalities" in Room 225. (Exhibit 8; Exhibit A page 100327-100348.)

19. The parents received a pamphlet notifying them of their Parental Rights in Special Education (Exhibit B100890) on February 21, 2003. The parents received this notice on several occasions before and after February 21, 2003. For example, when they participated in the development of earlier IEP's, in the course of the latest IEP, and prior to IEP team meetings thereafter. (Testimony of ****.)

IEP.

20. The testimony of many witness established [the student] was not expected to have difficulty completing [the district]'s general education 9-12 high school graduation plan (See Exhibit A page100328, for example.)
21. [The student] is not cognitively impaired. [The student] needed special education and related services for his below average verbal and nonverbal communications skills (Exhibit A page 1003160) difficulties with sensory processing/transition/self regulation (Exhibit A page100317), study skill/organization (Exhibit A page100318) written language (Exhibits A page100320) and social behavior (Exhibit A page100321.)
22. A free appropriate public education (FAPE) includes both special education and related services.
23. [The student's] parents considered his behavior, his inability to organize, his difficulty communicating effectively, his grooming, his lack of a peer group, attentions and social problems including aggressive behaviors [the student]'s most serious problems. They wanted [the district] to work on those problems in addition to [the student]'s academic performance. (Testimony of [parent] and numerous notes and documents in Exhibit A and B.) [The district] agreed with the parents.
24. [The student]'s IEP reviewed his present level of educational performance, including how his disability affects his progress. It included a statement of measurable goals regarding his educational needs. It included education in the least restrictive environment and related services (See, for example, Exhibit A page 100332.) It addressed transition. It addressed assessment.
25. An IEP must meet the requirements of 34 CFR 300.347. [The student]'s IEP met these requirements.
26. [The student]'s parents did not approve of the content of the March 26, 2003 IEP. [The student] did not attend [the district] at that time.

Implementation of IEP.

27. The parents objected to the contents of the IEP in a letter to [the district] dated May 10, 2003. In the parents' opinion the resources identified in the IEP and available at [the school]

were inadequate to meet [the student]'s educational and behavioral needs. They stated that the IEP failed to clearly identify a peer group for [the student] and failed to address significant behavioral issues. (Exhibit 8 and Exhibit A page 100341-343)

28. In September of 2003 [the parents] asked the IEP team to reconvene. It did so on September 8, 2003. The proposed IEP developed at the 3/26/03, meeting is Exhibit A page 100310-100323. The IEP developed at the 9/8/03 meeting is Exhibit A page 100327-0349 (For clarity reviewing the record the original, typed document was dated 3/26/03. The changes to the IEP in September were hand written on the document. The 9/8/03 IEP therefore is dated 3/26/03.)
29. [The parents] signed as having participated in the development of the IEP and [parent] signed as having approved the IEP. (Exhibit A page 100344.) [The student] began to attend [the district] in September 2003.
30. From September 2003 through December 15, 2003, [the student] remained enrolled at [the school]. His overall progress was monitored by ****. Occupational therapy services were provided and monitored by ****. Speech language therapy was provided by ****. Mrs. **** was [the student]'s counselor. Reports referred to as "Mainstream Reports" were submitted by general education teachers to ****. (Exhibit 8B; Exhibit A page 100350-100352). [The student] also participated in adaptive P.E.
31. [The student] did well in his physics class and band. He did not do well in calculus. Much of his class time was spent with Internet courses or in "Room 225." (Testimony [parent], Testimony ****, Exhibits A and B.) The district's testimony regarding Room 225 was vague. **** testified that it was not a self-contained classroom, it was not a resource room and it was not a classroom for students identified as emotionally disturbed. (Testimony of ****.)
32. IEP measurable goals were developed in the areas of communication, transition/self-regulation, study skills/organization, written language, and social/behavioral. (Exhibit 100327 – 100348). [The student's] progress toward his goals was monitored by ****.
33. [The district] was satisfied with [the student]'s education and considered him progressing in his IEP goals. [The student]'s parents were not satisfied with [the student]'s education or the progress toward his goals. They were particularly unhappy with behavioral issues -- social skills, grooming, violent behavior and drugs.
34. Speech Therapy is a related service. [The student] was demonstrating improvement in speech therapy. In September his speech therapist determined that, of 25 pragmatic skills measured, seven skills were present (28%), and 18 were absent (72%). In October she determined that of the 25 pragmatic skills, 13 were present (52%), seven were emerging (28%), and five were absent (20%). (Exhibit 100357A).
35. With respect to sensory integration issues, [the student] was provided a separate room to take breaks, was provided with stress balls and therabands, and was given additional physical

activity time. (Testimony of ****.)

36. Additional IEP meetings were held on September 29, 2003, and October 27, 2003. At that time [the student] was doing well in Applied Physics, Calculus, and Band. Exhibit A page 100346.
37. An IEP meeting was held on October 27, 2003. [The student] was no longer doing well in Calculus. Social issues, including a confrontation with another student, were discussed. Finding a peer group was identified as a priority. Exhibit A page 100347. [The parents] received a copy of the Parental Rights in Special Education pamphlet. (Exhibit A page 100349).
38. The last IEP meeting was held on October 27, 2003. At that meeting, neither parent informed [the district] that they wanted to revise the IEP, place [the student] in a private school or request a due process hearing.
39. Prior to December 15, 2003, [the student] dropped his Calculus and Online Health courses. [The student] was tested to determine a more suitable math placement for the next semester. He was receiving passing grades in Applied Physics, **** Band, Essentials of World History, English 1-2, and English 3-4.
40. [The student] continued to have problems associated with his disability despite his educational program and his efforts.
41. The evidence establishes that [the district] was providing [the student] with a free appropriate public education (FAPE) including special education and related services. [The student's] individualized education program was designed to address [the student]'s behavioral issues regarding attention, social problems, thought problems, aggressive behaviors, and arguing. [The student] was making progress in his program.

Behavior issues.

42. [The district]'s testimony and the parent's testimony regarding [the student]'s social interaction with his high school peers, grooming, etc., were markedly different. **** testified that he was "a typical ****"(term for a student attending [the school]), participated in school activities, and was establishing a peer group among students in his classes. [parent] testified that [the student] was very unhappy, subject to bullying, poorly groomed, violent and had few friends.
43. The evidence in the record establishes [the student] was not well integrated into the general school population. He was having some difficulty in the general education courses. Most of his class time was spent on-line or in Room 225 and the parent's testimony was credible that he did not have a peer group and was not making rapid progress on issues such as grooming, organization and social skills.
44. [The student] was not a discipline problem at school. [The district] has a system for documenting disciplinary problems. [The student] had no in or out of school suspensions.

(Exhibit B.) He did not have any disciplinary pupil action reports. (Exhibit B.) [The student] did not have any serious disciplinary infractions while attending school at [the district]. [The student] reported two incidents of fights or bullying by other students. [The district] addressed these with [the student], the students, and his teachers. (Testimony of ****.)

45. [The student] did not engage in violent behavior at school. The evidence shows [the student] is not a danger to himself or others.
46. [Parent] testified that he and his son had disagreements and at least one violent confrontation at home in which [the student] brandished a knife. His testimony is credible. [The student] had behavioral problems at home. [The parent] did not call the police regarding the knife incident but he feared for the safety of other family members. (Testimony of [the parent])
47. [The student]’s parents arranged for [the student] to be transported, by surprise, back to SageWalk in December 2003 following the knife incident at home. [The student] attended Sage Walk between December 16, 2003 and January 14, 2004. From January 15, 2004, to the present date, [the student] has attended MontCalm.
48. [The student]’s parent chose to place him away from home in a residential facility. [The student] was unilaterally placed at MontCalm by his parents without consultation with [the district]. [The student] did not require placement in a public or private residential program to receive special education or related services from [the district].

CONCLUSIONS OF LAW

1 [The district] is a Montana public school district. It is subject to the requirements of state law, including Title 20, Chapter 7 Part 4, MCA, and the Individuals with Disabilities Education Act (IDEA), §§ 20 U.S.C. 1400, (2004) et seq. (IDEA has been re-authorized by Congress several times.

The latest re-authorization was passed December 3, 2004, in P.L.108-446. The Act states it may be cited as the Individual with Disabilities Education Improvement Act of 2004, so the acronym would become “IDEIA” For purposes of this order the acronym IDEA will continue to be used.)

2. IDEA and Montana special education law, Title 20, Chapter 7, Part 4, requires [the district] to provide a free appropriate public education [FAPE.] in the least restrictive environment to students identified with a disability.

3. A free appropriate education includes special education and related services. 20 U.S.C. 1401

(8), 20 U.S.C. 1412 (a) (1). 34 CFR 300.300, § 20-7-411, MCA.

Related services means transportation and any developmental, corrective, and other supportive services that are required to assist a child with a disability to benefit from special education and includes speech-language pathology, audiology, occupational therapy, physical therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parental counseling and training.

Section 20-7-401 (13), MCA.

4. [The student] is a student with identified disabilities and is entitled to receive a free appropriate, public education from [the district], including special education and related services.

5. In Board of Education et al. v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982), the U.S. Supreme Court established a two-part test to determine whether a student has been provided FAPE

First, has the State [or school district] complied with the procedures set forth in the Act [now Individuals with Disabilities Education Improvement Act of 2004]? And second, is the individualized educational program [IEP] developed through the Act's procedures reasonably calculated to enable the child to receive educational benefit? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

458 U.S. at 206-07.

6. [The district] has complied with the procedures set forth in the IDEA. [The student]'s parents received repeated notification of [the student]'s and their IDEA rights. [The district] provided a full and individual evaluation, identified [the student]'s areas of disability, convened a child study team, developed an individualized education program (IEP) and implemented the IEP.

7. [The student]'s IEP was developed in accordance with the procedures required by the IDEA and Montana law and was reasonably calculated to enable [the student] to receive educational benefit. The IEP included both special education and related services.

8. IDEA entitles a disabled student to a basic floor of opportunity consisting of specialized instruction and related services which are individually designed to provide some educational benefit.

Board of Education v. Rowley, 458 U.S. 176, 200 (1982). The requirement is only that the IEP confer “some educational benefit” upon the student. Rowley, 458 U.S. 176, 200 (1982).

9. The IEP implemented by [the district] was designed to provide more than “some educational benefit.” [The student] remained as student with disabilities but he was progressing toward a high school diploma, was acquiring the skills and knowledge to attend college or enter the work force, and was making progress toward his IEP goals. He was receiving speech therapy, occupational therapy and accommodations appropriate for his disabilities.

10. [The student]’s parents unilaterally placed him in a private school. Parents who unilaterally place their child in a private school setting may be reimbursed for their expenditures only if they can establish that an IEP calling for placement in public school was inappropriate under IDEA and that private school placement was proper under Act.

This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility.

34 CFR 300.403 (a).

[The student]’s IEP calling for placement at [the district] was appropriate under IDEA and placement at MontCalm was not proper under IDEA.

11. 34 CFR 300.403 (d) states limitations on reimbursement for unilateral placement by parents:

Limitation on reimbursement. The cost of reimbursement described in paragraph (c) of this section may be reduced or denied—

(1) If—

(i) At the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(

i) of this section.

Even if [the student]'s IEP were deficient, which it was not, to receive reimbursement for residential placement [the student]'s parents would have had to comply with the requirements of this regulation.

The requirements were not met. [The student]'s parents neither informed the IEP team that they were rejecting the placement proposed by the IEP team nor gave written notice of their intent to enroll [the student] in a private school at public expense.

ORDER

[The district] has complied with §§ 20 U.S.C. 1400, (2004) et seq. [The student]'s individualized education program adequately addressed the special education and related service needs of [the student]. The school district made available a free appropriate public education to [the student]. His parents elected to place him in a private, residential facility. The parents' request for reimbursement for the costs associated with their unilateral placement is denied.

DATED March 23, 2005.

/s/ Geralyn Driscoll
GERALYN DRISCOLL
Hearings Officer.